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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 916

THEODORE VARITIMOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1968. The petition for a writ of certiorari was filed on January 8, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the privilege against self-incrimination barred conviction for various violations of the possession and transfer provisions of the National Firearms Act (26 U.S.C. 5801-5862).

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations (26 U.S.C. 5811, 5814, 5821, 5851, 5861; Mass. Laws Ann., ch. 140, §131 (1968) and ch. 269, §10 (1965); 26 C.F.R. 179.95-179.101, 179.170-179.172) are set forth in the appendix, *infra*, pp. 13-20.

STATEMENT

After waiving a trial by jury, petitioner was convicted in the United States District Court for the District of Massachusetts on five counts charging violations of the National Firearms Act (26 U.S.C. 5801-5862). On February 21, 1968, he was sentenced to imprisonment for three years on each count, the terms to run concurrently (R. 12-13). The court of appeals affirmed, finding that, in light of the concurrent sentences, it was necessary only to determine the absence of constitutional infirmity on two similar counts (Pet. App. A).

1. Petitioner was tried on a fourteen-count indictment:

> Counts 1 to 3 and 7 to 10 charged possession or interstate transportation of firearms not registered as required by 26 U.S.C. 5841, in violation of 26 U.S.C. 5851 and 5855.
>
> Counts 4 and 11 charged possession of two different firearms transferred to him not pursuant to an order form as required by 26 U.S.C. 5814, in violation of 26 U.S.C. 5851.
>
> Counts 5 and 12 charged possession of the same two firearms transferred to him without payment of the transfer tax as required by 26 U.S.C. 5811, in violation of 26 U.S.C. 5851.

Counts 6 and 13 charged petitioner with transferring firearms not pursuant to an order form, in violation of 26 U.S.C. 5814 and 5861.

And Count 14 charged petitioner with carrying on a business as a dealer in firearms without payment of the special occupational tax imposed by 26 U.S.C. 5801, in violation of 26 U.S.C. 5861 (R. 5-9).

The relevant evidence (the sufficiency of which is not challenged here) is summarized in the trial court's findings of fact. It showed that on December 13, 1966, petitioner had in his possession and transported in interstate commerce two firearms, namely, a Schmeisser Machine Pistol, Serial No. 3833, and a Schmeisser Machine Pistol, Serial No. 5538/g.[1] Each of these firearms had been transferred without use of the order form or payment of the transfer tax specified in the National Firearms Act (26 U.S.C. 5811, 5814), and neither had been registered as required by 26 U.S.C. 5841. Petitioner transferred the firearm bearing Serial No. 3833 to federal agents (R. 15-17).

2. On January 26, 1968, the trial court acquitted petitioner on Counts 13 and 14 (R. 11-12). Three days later, this Court announced its decision in *Haynes* v. *United States,* 390 U.S. 85, and on February 2, 1968, petitioner moved for judgment of acquittal on all the counts (Counts 1 to 3, and 7 to 10) which were premised upon non-compliance with the registration re-

[1] The firearm bearing Serial No. 3833 was the basis for Counts 1 through 6, while that bearing Serial No. 5538/g was the subject of Counts 7 through 13.

quirements of Section 5841 (R.10). This motion, which the government did not oppose, was granted (R. 10, 12). On February 19, 1968, petitioner's motion to dismiss the remaining five counts on self-incrimination grounds was denied (R. 10-11).

Because concurrent sentences had been imposed on all five counts, the court of appeals fully considered only Counts 4 and 11 charging petitioner with violating 26 U.S.C. 5851 by possessing a firearm which had been transferred to him not pursuant to an order form as required by 26 U.S.C. 5814. In affirming the convictions on those counts, the court below held that petitioner's own failure to complete an order form constituted an element of the crime, but that compliance with that requirement would not have been, in the circumstances, incriminating.

ARGUMENT

Petitioner contends that *Haynes* v. *United States,* 390 U.S. 85, requires reversal on all counts. In our view, neither *Haynes* nor the underlying policy of the Fifth Amendment privilege against self-incrimination requires further review of those counts (Counts 4, 5, 11, and 12) charging unlawful *possession* of a firearm which had been transferred in violation of the Act's order form requirements (26 U.S.C. 5814), or tax requirements (26 U.S.C. 5811). On the other hand, we agree with petitioner's contention and with the suggestion of the court below (Pet. App. A, p. 22, n. 8) that, under the relevant constitutional principles, the conviction on Count 6 charging petitioner with the un-

lawful transfer of a firearm in violation of 26 U.S.C. 5814, 5861, cannot be sustained. We discuss below first the operation of the National Firearms Act as relevant here, and then the validity of the various counts which petitioner seeks to have this Court review.[2]

---

[2] Apart from our view, discussed *post*, that petitioner was validly convicted on four of the five counts on which he was sentenced, we believe there is an additional factor relevant to this Court's exercise of its discretionary jurisdiction. Petitioner contends (Pet. 8-9) that this case raises important questions which have not yet been, but which should be, passed upon by this Court. But as part of the Gun Control Act of 1968, 82 Stat. 1213, Congress effected a "complete revision" (S. Rep. No. 1501, 90th Cong., 2d Sess., p. 20) of the National Firearms Act, under which the present prosecution arose. (The Act as completely redrafted, appears at 82 Stat. 1227-1235.) These substantial changes in the scope, administration, and impact of the National Firearms Act were made with the express purpose of meeting the constitutional objections raised in *Haynes* v. *United States*, 390 U.S. 85, by the *"Elimination of any element of self-incrimination."* H. Conf. Rep. No. 1956, 90th Cong., 2d Sess., p. 35 (emphasis original); see, also, S. Rep. No. 1501, *supra*, pp. 26, 42, 51-52. In light of the congressional correction of the deficiencies found controlling in *Haynes*—the original Act's focus on persons inherently suspect of criminal activities and the possible use of required information in a criminal prosecution—the issues petitioner tenders can no longer arise in a context similar to the present one.

Thus, while petitioner suggests that the petition should be granted for further clarification by this Court as to what constitutes a "real and appreciable" danger of incrimination within the meaning of *Haynes*, *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, the 1968 amendments to the National Firearms Act make it inappropriate to use this case as the vehicle for such analysis. New Section 5848 (82 Stat. 1232) now provides that no "information or evidence obtained from an application, registration, or records" shall be used directly or indirectly, "as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration * * *."

A. *The statutory plan.*[3]

Section 5814, with exemptions not applicable here, requires approval by the Director of the Alcohol and Tobacco Tax Division prior to any transfer of a firearm. In order to obtain such approval, Section 5814 and the implementing regulations (26 C.F.R. 179.98-179.106) provide that the proposed transferee must prepare a special form, giving his name and address, fingerprints and photograph, and must supply a certificate from certain local or federal law enforcement officers to the effect that the fingerprints and photograph are authentic and that possession of the designated firearm would be lawful under state and local law. Once the transferee has completed his portion of the form, the prospective transferor, on the same form, must state his name and address, and describe the firearm, including length of the barrel, the model, the caliber or gauge, the serial number, marks of identification, and name and address of the manufacturer (if known). Once the transferor has completed this portion of the order form, he must satisfy the requirement of 26 U.S.C. 5811 imposing a transfer tax of $200 to be paid prior to the transfer. The payment of the transfer tax is effected by the purchase of a "National Firearms Act" stamp from a local district director of Internal Revenue (26 U.S.C. 5811(c); 26 C.FR. 179.95-179.97, 179.170-179.172). Once the stamp has been purchased, the transferor must attach it to the order form and cancel it by writing his initials and date thereon in ink. Full compliance with the Na-

[3] The following discussion treats the Act as it stood at the time of the offenses in 1966, before it was restructured in 1968.

tional Firearms Act is effected when the order form, with tax stamp attached, is sent to the Director for approval.

B. *The convictions on Counts 4 and 11.*

To ensure compliance with the order form requirements of Section 5814, Section 5851 provides that it is unlawful for any person to receive or possess a firearm which has *at any time* been transferred in violation of that section. As we understand the opinion of the court below, the elements of the crime were construed to be (1) receipt or possession of a firearm; (2) a transfer of the firearm to the accused; and (3) non-compliance *by the accused* with the order form requirements of 26 U.S.C. 5814 (see Pet. App. A, pp. 17-18). Although there is room for argument that the accused's compliance or non-compliance with the order form requirements is not an element of the crime defined by Section 5851, so long as there is a showing that the firearm had been "at any time" transferred in violation of those requirements (see, *e.g., Haynes, supra,* at 92-93), it is unnecessary to reach that question here since there was no such evidence below, and since—in view of the approach taken by the court below—resolution of that issue is unimportant to the disposition of this case. Moreover, the issue of construction does not present a recurring problem requiring resolution by this Court, since the ambiguity has been removed by legislative enactment.[4]

[4] Under new Section 26 U.S.C. 5861(b), enacted as part of the Gun Control Act of 1968, receivers or possessors of illegally transferred firearms may be convicted only if there is proof that the illegal transfer was made *to them* (82 Stat. 1234).

Construing the statute as reaching non-compliance by the transferee with the order form requirement does not render the statute subject to the defense that compliance would have been incriminating for petitioner. There is no doubt—and petitioner does not argue to the contrary—[5] that compliance with the order form requirements would not have resulted in the disclosure of any information incriminating as to federal law. Had he completed the order form, he would have done all that federal law required, and transfer of the firearms would have been legal. Compliance would also not have been incriminating under state law. Although Massachusetts law generally makes the possession of a machine gun unlawful (Mass. Laws Ann., ch. 269, Section 10 (1968)), it has provisions for permission to take possession. Under the provisions of Mass. Laws Ann., ch. 140, Section 131 (1965), any person (with certain exceptions not applicable here) may obtain a license to possess a firearm from the "chief of police or the board or officer having control of the police in city or town, or the commissioner of public safety, or persons authorized by them, respectively" upon

[5] Although not argued by petitioner, it has been suggested elsewhere that if a prospective transferee satisfies the order form requirements of Section 5814, such action would be incriminatory under *federal* law if the firearm had *previously* been transferred in violation of the National Firearms Act. See *United States* v. *Thompson*, Cr. No. 1899 (D. Del.), decided November 19, 1968. That suggestion is premised upon the assumption that a transferee of a firearm is criminally liable for illegal transfers other than that made to him. Inasmuch as there is no evidence here, however, that the firearm had been transferred illegally prior to petitioner's acquisition, there is no need to consider that possibility here. And, as noted above, the Gun Control Act of 1968 has eliminated this danger, since it is now specifically provided that a transferee is criminally liable only for illegal transfers made to him.

a showing that such possession is necessary to protect his person or property, "or for any other proper purpose, including the carrying of firearms for use in target practice only." As noted above, in order to complete his obligation under the federal order form requirements, the intended transferee must obtain a certificate of "the local chief of police, sheriff of the county, United States Attorney, United States marshal or such other person whose certificate may in a particular case be acceptable to the Director," to the effect that possession would be lawful under state law (26 C.F.R. 179.99). Thus, for someone in petitioner's circumstances, the order form requirement created no "real and appreciable" risk of incrimination. *Haynes* v. *United States, supra,* 390 U.S. at 97. The order form itself advises the prospective transferee that it need be forwarded to the Director only if a certificate of lawfulness is obtained (see Pet. App. C, p. 31). If such a certificate could not have been obtained by petitioner, he would have no reason to perform the futile act of forwarding the order form to the Director; if such a certificate of lawfulness had been obtained, possession of the firearm would, by definition, have been lawful under state law, and submission of the order form would not have been incriminatory. Petitioner's convictions, therefore, for possession of firearms transferred (to him) in violation of the order form requirements, present no conflict with the privilege against self-incrimination.

C. *The convictions on Counts 5 and 12.*

In order to ensure that the $200 transfer tax is paid prior to transfer, Section 5851 also makes unlawful

the receipt or possession of any firearm which has at any time been transferred without payment of such tax.[6] Inasmuch as the sentences imposed on Counts 5 and 12—charging petitioner with possession of the two firearms on which the transfer tax had not been paid—were ordered to run concurrently with those imposed upon Counts 4 and 11, the court below did not review the validity of those convictions, except to comment that the convictions "appear to pass muster under *Haynes*" (Pet. App. A, p. 22, n. 8). Even if this Court should decide in *Benton* v. *Maryland,* No. 201, O.T., 1968, that the imposition of concurrent sentences does not preclude appellate review of *all* counts, there would be no reason to remand the case for consideration of the convictions on Counts 5 and 12. Payment of the transfer tax—although effected by the transferor—cannot realistically be severed from the obligation of the transferee to complete *his* portion of the order form prior to the time that the transferor attaches the tax stamp to the order form and forwards it to the Director for approval. Since it is the transferee who must initiate the procedure during which the transfer tax is to be paid, assessment of the hazard that compliance with the tax provisions of the Act might incriminate the transferee is governed by the same considerations as those discussed above with regard to compliance with the order form requirements. For the same reasons, the transferor's payment of the

[6] If the firearm is transferred without payment of the tax, the transferee becomes jointly and severally liable for its payment along with the transferor. 26 U.S.C. 5811(b). There is, however, no provision for a transferee in such circumstance to make voluntary payment of the tax.

tax would not, in the circumstances, have incriminated petitioner. The convictions on Counts 5 and 12 are therefore proper.[7]

D. *The conviction on Count 6.*

The conviction on Count 6, however, charging petitioner with the sale of a firearm to federal agents not in pursuance of an order form, in violation of 26 U.S.C. 5814, presents a quite different situation, and we concede that the conviction cannot be reconciled with the principles announced in *Haynes*. Had petitioner, as a transferor, filed the order form required by Section 5814, he, at the very least, would have admitted ownership and/or possession of the firearm. This admission, coupled with proof that there was no recordation of a transfer previous thereto, would have provided substantial evidence to support a federal conviction for his pre-existing receipt or possession of a firearm transferred in violation of Sections 5814 and 5851. Such a disclosure, therefore, would have been incriminating under *Haynes*, and in the face of his assertion of his privilege petitioner should not have been convicted of failing to comply with Section 5814. Thus, in the event that the Court should decide that, despite the imposition of concurrent sentences, each count must be separately considered, we would suggest that the petition for a writ of certiorari be granted, limited to Count 6, and the cause remanded to the district court with directions to vacate the judgment on that count.

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[7] The transferee knows whether the transfer tax on the firearm he receives has been paid, because the approved original of the order form, with the tax stamp attached, is to be delivered to him along with the firearm. 26 C.F.R. 179.98.

CONCLUSION

For the reasons stated, we suggest that the petition for a writ of certiorari should either be denied or granted only as to Count 6. In the latter event, the cause should be remanded to the district court with directions to vacate the judgment on that count.

Respectfully submitted.

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FEBRUARY 1969.

APPENDIX

26 U.S.C. 5811 provides in pertinent part:

(a) Rate.

There shall be levied, collected, and paid on firearms transferred in the United States a tax at the rate of $200 for each firearm: *Provided,* That the transfer tax on any gun with combination shotgun and rifle barrels, 12 inches or more but less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and on any gun classified as "any other weapon" under section 5848(5), shall be at the rate of $5. The tax imposed by this section shall be in addition to any import duty imposed on such firearm.

(b) By whom paid.

Such tax shall be paid by the transferor: *Provided,* That if a firearm is transferred without payment of such tax the transferor and transferee shall become jointly and severally liable for such tax.

(c) How paid.

(1) Stamps.

Payment of the tax herein provided shall be represented by appropriate stamps to be provided by the Secretary or his delegate.

* * * * *

26 U.S.C. 5814 provides in pertinent part:

(a) General Requirements.

It shall be unlawful for any person to transfer a firearm except in pursuance of a written order from the person seeking to obtain such article, on

an application form issued in blank in duplicate for that purpose by the Secretary or his delegate. Such order shall identify the applicant by such means of identification as may be prescribed by regulations under this chapter: *Provided,* That, if the applicant is an individual, such identification shall include fingerprints and a photograph thereof.

(b) Contents of order form.

Every person so transferring a firearm shall set forth in each copy of such order the manufacturer's number or other mark identifying such firearm, and shall forward a copy of such order to the Secretary or his delegate. The original thereof, with stamp affixed, shall be returned to the applicant.

* * * * *

26 U.S.C. 5821 provides in pertinent part:

(a) Rate.

There shall be levied, collected, and paid upon the making in the United States of any firearm (whether by manufacture, putting together, alteration, any combination thereof, or otherwise) a tax at the rate of $200 for each firearm so made.

* * * * *

(c) By whom paid; when paid.

The tax imposed by subsection (a) shall be paid by the person making the firearm. Such tax shall be paid in advance of the making of the firearm.

(d) How paid.

Payment of the tax imposed by subsection (a) shall be represented by appropriate stamps to be provided by the Secretary or his delegate.

(e) Declaration.

It shall be unlawful for any person subject to the tax imposed by subsection (a) to make a firearm unless, prior to such making, he has declared in writing his intention to make a firearm, has affixed the stamp described in subsection (d) to the original of such declaration, and has filed such original and a copy thereof. The declaration required by the preceding sentence shall be filed at such place, and shall be in such form and contain such information, as the Secretary or his delegate may by regulations prescribe. The original of the declaration, with the stamp affixed, shall be returned to the person making the declaration. If the person making the declaration is an individual, there shall be included as part of the declaration the fingerprints and a photograph of such individual.

26 U.S.C. 5851 provides:

It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of sections 5811, 5812(b), 5813, 5814, 5844, or 5846, or which has at any time been made in violation of section 5821, or to possess any firearm which has not been registered as required by section 5841. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant ex-

plains such possession to the satisfaction of the jury.

26 U.S.C. 5861 provides:

> Any person who violates or fails to comply with any of the requirements of this chapter shall, upon conviction, be fined not more than $2,000, or be imprisoned for not more than 5 years, or both, in the discretion of the court.

Mass. Laws Ann., ch. 269, § 10 (1968) provides in pertinent part:

> * * * Whoever, except as provided by law, possesses a machine gun as defined in [c. 140, § 121] without permission under [c. 140, § 131] shall be punished by imprisonment in the state prison for life or for any term of years. . . .

Mass. Laws Ann., ch. 140, § 131 (1965) provides in pertinent part:

> The chief of police or the board or officer having control of the police in city or town, or the commissioner of public safety, or persons authorized by them, respectively, after an investigation, may, upon the application of any person, including a minor eighteen or over who has the written consent of his parent or guardian, residing or having a place of business within their respective jurisdiction, except an alien, a person who has been convicted of a felony or of the unlawful use, possession or sale of narcotic or harmful drugs or a minor under the age of eighteen, issue a license to such applicant to carry firearms in the commonwealth or to possess therein a machine gun, if it appears that he is a suitable person to be so licensed, and that he has good reason to fear injury

to his person or property, or for any other proper purpose, including the carrying of firearms for use in target practice only. * * *

26 C.F.R. 179.95 provides:

Scope of Tax.

Except as otherwise provided (see §§ 179.103 and 179.104), each transfer of a firearm in the United States is subject to tax to be represented by an adhesive stamp of the proper denomination bearing the words "National Firearms Act" (see §§ 179.98, 179.170, and 179.171).

26 C.F.R. 179.96 provides:

Rate of Tax.

The transfer tax imposed with respect to firearms transferred within the United States is at the rate of $200 for the transfer of each firearm, except that, the transfer tax imposed with respect to any gun with combination shotgun and rifle barrels, 12 inches or more but less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and on any gun classified as "any other weapon" under section 5848(5), I.R.C., is at the rate of $5 for the transfer of each such weapon.

26 C.F.R. 179.96a provides:

Liability for tax.

The tax imposed on the transfer of a firearm shall be paid by the transferor, except that, if a firearm is transferred without payment of the proper tax, the transferor and transferee shall be jointly and severally liable for such tax.

26 C.F.R. 179.97 provides:

> Transfer tax in addition to import duty.
>
> The transfer tax imposed by section 5811 of the Internal Revenue Code of 1954 is in addition to any import duty (see § 179.132).

26 C.F.R. 179.98 provides:

> Written application and order required for transfer of firearm.
>
> Except as otherwise provided, no firearm may be transferred in the United States unless a Form 4 (Firearms) covering the transfer of the firearm has been approved by the Director, Alcohol and Tobacco Tax Division, Washington 25, D.C. The person seeking to obtain a firearm must complete the items in Form 4 (Firearms), in duplicate, relating to the applicant, execute said form as the applicant, and then submit the form, in duplicate, to the person transferring the firearm. The person desiring to transfer the firearm will complete the items in the Form 4 (Firearms), in duplicate, relating to such a person, affix to the original a "National Firearms Act" stamp of the proper denomination in the space provided (§179.96), properly cancel such stamp (§ 179.101), execute the said form, and submit the said form, in duplicate, to the Director for approval. Upon approval, the original of the Form 4 (Firearms) will be returned to the transferor, who may then deliver the firearm and the approved original Form 4 (Firearms) to the applicant.

26 C.F.R. 179.99 provides:

Identification of applicant.

If the applicant is an individual, he shall attach to each copy of the application an individual photograph of himself, taken within one year prior to the date of such application, and shall affix his fingerprints to such application. The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them. The application must be supported by a certificate of the local chief of police, sheriff of the county, United States attorney, United States marshal, or such other person whose certificate may in a particular case be acceptable to the Director, Alcohol and Tobacco Tax Division, certifying that he is satisfied that the fingerprints and photograph appearing on the application are those of the applicant and that the firearm is intended by the applicant for lawful purposes.

26 C.F.R. 179.100 provides:

Requirements for approval of application and order for transfer:

The Form 4 (Firearms), must be forwarded, directly, in duplicate, by the transferor to the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington 25, D.C. The Director, Alcohol and Tobacco Tax Division, will consider the application for approval or disapproval. If the application is approved, the Director, Alcohol and Tobacco Tax Division, will return the original thereof to the transferor, who may then deliver the firearm to the applicant, together with the original Form 4 (Firearms) with the

"National Firearms Act" stamp attached thereto. If the application is disapproved, the original Form 4 (Firearms) with the "National Firearms Act" stamp attached thereto will be returned to the transferor with the reasons for disapproval stated on the form.

26 C.F.R. 179.101 provides:

Cancellation of stamp.

The same method of cancellation as prescribed in § 179.81 shall be used.

26 C.F.R. 179.170 provides:

Orders for stamps.

Each order for stamps to be used under this part shall be made in writing to the District Director or his duly authorized agent in the internal revenue collection district in which the stamps are to be used, showing the date of the order, the number of "National Firearms Act" stamps applied for, and the name and address of the purchaser, and shall be signed in ink by the purchaser.

26 C.F.R. 179.171 provides:

Stamps authorized.

Adhesive stamps of the $5 and $200 denomination, bearing the words "National Firearms Act," have been prepared and distributed to District Directors, and only such stamps shall be used for the payment of the transfer tax and for the tax on the making of a firearm.

26 C.F.R. 179.172 provides:

Reuse of stamps prohibited.

A stamp once affixed to one instrument cannot lawfully be removed and affixed to another. Any person wilfully reusing such a stamp shall be subject to the penalty prescribed by section 7208 of the Internal Revenue Code of 1954.

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